United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7497

To be argued by
DAVID SCHOENBROD

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7497

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE, PAUL DUBRUL,

Plaintiffs-Appellants,

—v.—

HUGH CAREY, ABRAHAM BEAME, DAVID L. YUNICH, MICHAEL J. COBB, ALFRED EISENPREIS, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, MICHAEL LAZAR, JOHN ZUCCOTTI, MORRIS TARSHIS, PAUL O'DWYER, J. DOUGLAS CARROLL, JR., WILLIAM J. RONAN, THEODORE KARAGHEUZOFF, P.E., JAMES MELTON, OGDEN REID, STATE OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Dated: New York, New York
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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT OF FACTS

TWO PARTICIPANTS IN THIS CONTROVERSY ARE NOT BEFORE THIS COURT -- NEW YORK STATE AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

A. New York State

New York State has not submitted a brief to this Court, although the State, the Governor, and other State officials are Defendants and participated below. The State has a pivotal role in this case.

This is an action to enforce a State implementation plan which the State adopted to prevent EPA from promulgating a federal plan. 42 U.S.C. §1857c-5(c). The State Plan acknowledged that fare increases adversely affect air quality and sought to forestall such increases through the revenues from the bridge toll and other strategies and to contain adverse effects from any remaining fare increases by limiting traffic in Manhattan through the parking and other strategies.*

A State authority, the Transit Authority, now claims the use of bridge toll revenues to subsidize the fare was only a suggestion " 'to sweeten' " the package.

*E.g., Plan at §§1.2.2, 3.1, 3.5, 5.2, 5.3, 10.2, 10.3, 10.4. See also Plaintiffs' Brief at 13-15. (A140,A148-52, A206-07, A211-12).

(TA Br. p.5*). If so, this Court was one of the victims of this sweet talk, for the State told this Court that the bridge toll strategy's "purpose is to raise revenues for the City mass transit system...." (State Br. at 10, filed in FOE v. EPA, 499 F.2d 1118 (2d Cir. 1974) (Dkt. No. 73-2038)). The State and EPA's briefs and oral arguments to this Court repeatedly relied upon the relationship between the fare and the Plan's strategies to justify the lack of an explicit fare strategy.** EPA has now ruled that the Plan requires that toll revenues be used to subsidize transit operations. (TA Br. p.5).

This Court on the last appeal found that the State was in apparent violation of the Plan but held that enforcement against the State should be in the District Court. FOE v. EPA, 499 F.2d at 1128. Plaintiffs subsequently brought this suit. The gravaman of the complaint, simply stated, is that the State is in violation of the Plan in its entirety.

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*"TA Br. refers to Answering Brief of the New York City Transit Authority and David Yunich; "City Brief" refers to the Answering Brief of the City Defendants.

**Plaintiffs' letter of August 20, 1975 (Doc. 34 in the supplemental record on appeal.)

The relief sought is implementation of the State Plan's strategies, not a court-fashioned Plan as the City now suggests.*

In District Court, the State never denied that it was violating its Plan. The State did, moreover, agree with Plaintiffs and EPA's prediction that the fare increase would cause a 10% loss in ridership. (A219).**

By not filing a brief in this Court, the State avoids having to answer for the sharp contrast between what the State previously told this Court and the position now adopted by a state authority on the relationship between the fare and the Plan.

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*City Brief at 4. The complaint and Plaintiffs' first Motion for Preliminary Injunction dated October 11, 1974, sought to enforce only the strategies of the State Plan. A court-ordered timetable was necessary because Defendants had missed most of the deadlines set in the Plan as written. This is what the City calls "a court-fashioned plan and timetable...." (emphasis in original) City Brief at 4.

**The Transit Authority attacked one prediction of lost ridership. (A167). But, the statistics for the first month following the fare increase released by the Transit Authority showed an 8% decline in ridership in the month of September. "Fare Rise Hit Buses Harder Than Subway, M.T.A. says" N.Y. Times (Oct. 10, 1975). The Transit Authority has reacted by withholding ridership figures for October and November and asserting in its brief, without supporting statistics or affidavits, that "average loss of rapid transit ridership (approximately 3%) has remained, apart from the first month following the increase, basically the same as the immediately preceding months." (TA Br. at 6). This assertion is deceptive since it appears to include only rapid transit ridership, and not bus ridership which apparently is more sensitive to fare changes.

(fn. cont'd on p.4)

B. The Environmental Protection Agency

EPA, represented by the United States Attorney, participated below, but was not a party. (A222-28). In EPA's absence, the City claims that EPA has "in large part," dealt with the violations raised by Plaintiffs. (City Br. p. 5). The City misleads this Court.

EPA has taken no action as to 20 of the 32 Plan strategies which are in violation.* Moreover, as to the remaining strategies, EPA enforcement orders mean little because the City, in defiance of the State and EPA, remains adamant in its refusal to carry out the Plan.

This is not Plaintiffs' assertion. Rather, this is what the City flatly states in sworn affidavits

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(fn. from p. 3)

New York Times, supra. Moreover, one cannot tell from the Transit Authority's brief whether the post-September figures were compared to other time periods with appropriate or undue adjustments for economic and seasonal trends. In any event, more telling than the Transit Authority's off-the-record assertions slipped into its brief, is its affidavit submitted below in which it stated that the fare could be rolled back. (A166). A hearing on remand is the appropriate forum for the Transit Authority to introduce statistics relating ridership and the fare.

*While some of these strategies represent fallback positions, it must be remembered that air pollution has increased since the Plan's adoption, not gone down 78% as the law and the Plan require.

filed in the District Court subsequent to the District Court's decision. In affidavits filed on September 22, 1975, the City says that it would or could not implement six of the seven strategies which are the subject of EPA's enforcement orders to the City. (Addendum to this Brief). This Court should not be misled into ignorance when the true facts are on file in this very Courthouse.

Defendants' continuing defiance of their own Plan and EPA enforcement orders indicates that EPA should have long ago sought judicial enforcement if it intended to enforce this implementation plan. EPA has, however, declined Plaintiffs' repeated invitation to join in this suit or to bring an enforcement action of its own. Plaintiffs served the notice of violation upon EPA required by the District Court.* Sixty days passed without EPA responding except by telephone from Region 2 stating that EPA would not commence an action of its own at this time.

EPA's absence strengthens Plaintiffs' suit; the purpose of the citizen suit provision is to allow citizens to enforce in lieu of the Agency when the Agency does not commence judicial enforcement within sixty days after notice. 42 U.S.C. §1857h-2(a),(b). See also e.g., Senate Report No. 91-1196, 91st Cong., 2d Sess.

*This notice was mailed on September 5, 1975. EPA also received the notice Plaintiffs served on August 5, 1974. (A94).

(1973) at 3,36-37; Legislative History of the Clean Air Act Amendments of 1970, 93rd Cong., 2d Sess. (1974) at 352; Natural Resources Defense Council v. EPA, 484 F.2d 1331,1337 (1st Cir. 1973).

The State's absence strengthens Plaintiffs' case as well; it betokens a total collapse in the State's ability to implement its Plan or even articulate a justification for its failures.

ARGUMENT

POINT I

DEFENDANTS FAIL TO MEET PLAINTIFFS' FIRST ARGUMENT THAT THE DISTRICT COURT ERRED AS A MATTER OF LAW

Plaintiffs' brief focused first on the District Court's error of law in amending the citizen suit provision by erecting barriers to citizen enforcement higher than those Congress intentionally specified. (Plaintiffs' Br. Point I). Defendants duck the argument.

The District Court refused to hear Plaintiffs until Plaintiffs bring EPA into the case and show that its enforcement is inadequate. (A11-14). Plaintiffs want EPA in the case, have repeatedly requested its presence, did carry out the Court's instructions that led to EPA participation in everything but name, and are now naming EPA as a formal party. But, Plaintiffs do not have to prove that EPA is a violator itself. Congress said this was unnecessary, after specifically addressing the concerns that prompted the District Court to follow its expressed "policy" against judicial action. (A13). Congress decided to make persons such as Defendants liable to citizen enforcement where, after sixty days notice, they have not corrected the violations and EPA nas not commenced suit. (Plaintiffs' Br. 24-29). Congress held that EPA can

forestall citizen enforcement only by prosecuting its own judicial action diligently, while the Court held that partial, incomplete administrative action might suffice.

The Transit Authority and the City each pretend that the District Court did not make this error of law by reconstructing the facts contrary to the record below.

A. How the Transit Authority Obscures the Issue

The Transit Authority says that the District Court denied relief on the fare because Plaintiffs had not met the traditional tests for preliminary relief. (TA Br. 8-9). The District Court, however, ruled as a matter of law that the Complaint and the Notice were inadequate as against the Transit Authority. (A8-9). (These errors are discussed as Points II and III in Plaintiffs' Briefs).

The Transit Authority details only one example of the Court's supposed exercise of discretion -- the impact on the Transit Authority of preliminary relief on the fare. (TA Br. 9-10). But the Court's only conclusion on this question was that no participant supplied it with enough information as to the economic possibilities, although it had said earlier there would be a factual

hearing on such issues. (A10-11, 201). The Court did not decide who had the burden on this issue and accordingly did not deny relief on this basis.*

The District Court did, however, deny preliminary relief to enforce the Plan, the second prong of Plaintiffs' motion, on the grounds that Plaintiffs had not shown a high probability of success on the merits. (A12). This is where the Court expressed its error of law in ruling that liability to citizen suits depends on the inadequacy of EPA's administrative-level enforcement.

B. How the City Obscures the Issue

The City sidesteps this error of law by claiming that the District Court was doing no more than exercising its discretion to involve EPA so as to coordinate judicial and administrative enforcement. (City Br. 9-16). The City's argument also reconstructs the facts contrary to

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* The Transit Authority cites two cases for the proposition that Plaintiffs had the burden on this issue. (TA Br. 10). These cases hold that Plaintiffs meet their burden by meeting either of the two traditional tests for preliminary injunction. Since Plaintiffs showed a high probability of success on the merits and irreparable harm to the public, the Transit Authority's own cases show why it had the initial burden on the question of economic feasibility. (Plaintiffs' Br. 13, 19). The Transit Authority would have to meet a heavy burden to show that it, together with the State, could not comply with the relief requested. NRDC v. Train, 510 F.2d 692, 713-14 (D.C.Cir. 1975).

the record and is unresponsive for three reasons. First, EPA participated below. Second, if EPA was needed as a party, the Court's only reasonable course was to bring EPA in, not throw Plaintiffs' motion out. Third, instead of merely coordinating relief, the District Court did, in fact, make violation by EPA an element of the offense.

1. EPA Participated Below

The Court itself took care of the need to get information from EPA by directing all parties to solicit EPA's position. (A200-201). On the basis of this request, the Agency, represented by the United States Attorney, supplied a detailed statement in three days. (A222-228). In addition, EPA stood by, ready to testify.

The City thus speaks nonsense when it says that the District Court's action was necessary to prevent the Court from acting in "blissful ignorance." (City Br. 11). As the Court pointed out, EPA's offices are "approximately 200 yards away from this courtroom." (A193).

2. The Court Abused Its Discretion, If Its Object Was Solely to Make EPA a Party

The City claims that EPA had to be a party in name, as well as practice, so as to avoid subjecting

the Defendants to inconsistent obligations. (City Br. 11). The District Court did not rely on this ground and it is, in any event, a make-believe problem with which Congress dealt explicitly in enacting the citizen suit provision.*

But, assuming arguendo that the Court sought to join EPA solely to coordinate enforcement, the District Court abused its discretion by throwing out the motions instead. The Court explicitly dealt with EPA's absence at its July 30 hearing and announced a resolution that involved EPA. (A200-201). It then said no more on the subject until August 28, the eve of the fare increase. At the hearing and afterwards, it could have asked EPA to volunteer party status as well as participation; it could have ordered Plaintiffs to serve papers on EPA; or the Court could have joined EPA on its own motion. F.R.C.P. Rule 21.

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* EPA has shown no inclination to attempt to override Court orders directed against violators and its stance as an enforcer in this case is not so aggressive to say the least. In any event, the Agency can enforce only by going to District Court, where the City could readily obtain consolidation of the actions. 42 U.S.C. §1857c-8(a). Finally, administrative and judicial enforcement is to hold violators to the same standards, the standards of the Plan, as the legislative history repeatedly points out. (Plaintiffs' Br. 26).

3. The Court Erred in Ruling that Judicial Enforcement Required a Threshhold Showing That EPA Enforcement Was Inadequate

The Court did not use readily available means to coordinate judicial remedies with administrative remedies because the Court ruled, as a matter of law, that disputed facts prevented a determination of liability. (A12). The District Court's opinion clearly distinguishes liability and relief. (A12-13). As to liability, the District Court found that Plaintiffs had neither shown a high probability of success on the merits nor established a case for summary judgment. (A11-14). Plaintiffs had, however, shown, beyond dispute, that violations of the Plan's schedules were massive and that EPA had not commenced judicial enforcement after a sixty-day notice.* This is the statutory standard on the threshhold question of liability. Section 304; 42 U.S.C. §1857h-2. The District Court found to the contrary that there could be no liability without some unspecified showing as to the inadequacy of EPA's administrative enforcement, even when EPA had not issued orders. (A12). Accordingly, the District Court ruled that EPA had to be brought in as a violator, not simply as a witness, or a party joined to coordinate relief. (A13-14).

*EPA was served with this notice on August 5, 1974. (A94).

Plaintiffs' brief shows that this constitutes an error of law on the threshhold question of liability. The statutory language, the legislative history, and the Congressional purposes all support this interpretation. (Plaintiffs' Br., Point I).

Against the weight of this authority, the City cites only section 113 (42 U.S.C. §1857c-8) for the proposition that the Act manifests:

> a Congressional intent that USEPA have a maximum flexibility to deal with the complex technical, social, political, and economic problems inherent in the administration of the air pollution control program. (City Br. 10).

Section 113 allows EPA to enforce administratively or judicially, but does not authorize EPA to relax Plan requirements. Rather, "EPA approval of a proposed revision is necessary to relax the implementation schedule." Metropolitan Washington Coalition v. District of Columbia, 511 F.2d 809, 812 (D.C.Cir. 1975). In approving a revision, EPA has no authority to let politics and similar considerations override the achievement of air quality standards. 511 F.2d at 813. The D.C. Circuit's approach is based squarely on decisions from three other Circuits and has been upheld by the Supreme Court. 511 F.2d at 812; Train v. NRDC, 421 U.S. 60, 64-67 (1975). Speaking in regard

to both EPA and citizen enforcement, the Supreme Court said:

> A polluter is subject to existing requirements until such time as he obtains a variance and variances are not available under the revision authority until they have been approved by both the State and Agency. 421 U.S. at 92, 92 n.27.

The Supreme Court decision deals comprehensively with all of the means for EPA and a state to free violators from a plan's requirements. Each means has strict procedural and substantive safeguards. (Plaintiffs' Br. 32-34). Until and unless these formal procedures are completed, Congress expressly intended that the Plan would provide the uniform standard of enforcement for citizens and EPA alike. (Plaintiffs' Br. 26).

The City would thus allow EPA to amend the Plan informally without the safeguards provided in the Act. Yet, it fails to respond to Plaintiffs' argument that this approach creates a fatal loophole in the Act. (Plaintiffs' Br. 32-34).

Instead of responding to Plaintiffs' arguments on the interpretation of the law, the City launches groundless attacks upon Plaintiffs. The City claims, first, that Plaintiffs should have gone back into Court during

the seven months of negotiations between the two motions for preliminary injunction. (City Br. 15-16). This is a classic case of the law-breaker blaming the victim. Plaintiffs were participating in the administrative process and returned to the Court only when the City refused to consent to orders on the bridge tolls and parking strategy and announced a fare increase, all within a matter of days. (A132-137).

The City's second attack is that Plaintiffs made the status of administrative enforcement an issue in the case. (City Br. 14-15). But, the City, from the initial filing of this case through its brief in this Court, pretended in its papers that the administrative procedures were about to achieve something of significance. (E.g., A179-184). Plaintiffs would, in any event, inform the Court of administrative action and inaction because this is relevant in shaping relief, as the City emphasizes. (City Br. 10-12).

C. The Importance of Correcting The District Court's Error of Law

Plaintiffs have been denied any hearing on the merits of their claims, although this action was commenced more than a year ago. The District Court's repeated refusals to come to grips with the merits of the case --

whether presented as a motion for preliminary relief or for summary judgment -- are in keeping with its repeatedly expressed "policy" against judicial enforcement. (A13). But, the intentional policy and letter of the Act is to allow citizens to force judicial enforcement and participate in it, regardless of whether the action is commenced by a citizen or a willing or reluctant EPA. (Plaintiffs' Br. 26-28).* The expressed purpose of this policy was to insure the aggressive enforcement that had been lacking under previous law and to supplement EPA's capacity. (Plaintiffs' Br. 10, 29-30).

The clash between the policies of Congress and the District Court is now crystalized in the District Court's error of law which effectively amends the language of the citizen suit provision. (Plaintiffs' Br. 24-28). That error would cripple citizen enforcement because citizens in most cases lack the resources to prove that EPA abused its prosecutorial discretion and because citizens

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* The City's discussion in a footnote of C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir.1974) misses the point that, under the citizen suit provision, citizens come to court in the shoes of the administrative agency if EPA refuses to file suit. The City asserts that the case is inapposite because "the agency has clearly opted for the administrative process." (City Br. 13n). When the agency has made this choice and its administrative efforts do not achieve prompt compliance, a judge may close the doors of the courthouse to citizen enforcers no more than he could refuse to hear administrative officials seeking judicial enforcement.

would have to use their resources in litigating with EPA, instead of supplementing its efforts. The District Court's error of law must be corrected for the sake of public health in New York City and to uphold the citizen suit provision that the Congress found essential to the success of the Clean Air Act and other important environmental legislation. (Plaintiffs' Br. 30-35).

POINT II

PLAINTIFFS DEMONSTRATED THREE BASES WHY THE DISTRICT COURT ERRED IN RULING THAT THE TRANSIT AUTHORITY DID NOT RECEIVE SUFFICIENT NOTICE

Plaintiffs demonstrated that the citizen suit notice provision did not preclude jurisdiction over the Transit Authority as a party to the action or over the transit fare. (Plaintiffs' Br. Point II). The Defendants' answering arguments fail to meet these issues.

A. The Statute Does Not Require Notice to a Delegate Agency of the State in an Action to Enforce Implementation of a State Plan

The Transit Authority was properly joined because it was a delegate agency of the state with responsibilities under the Plan. (Plaintiffs' Br. pp. 40-43). Accordingly, there was no need for notice in addition to that already sent to the State. In response to this argument, the City Defendants offer no answer and the Transit Authority only cites irrelevant material.

The Transit Authority suggests that legislative history of the Clean Air Act supports a theory that each agent of the State must receive

independent notice. (TA Br. p.15). The history cited does not discuss the issue at all.

Secondly, the Transit Authority relies upon a paragraph from District of Columbia v. Train, Dkt. No. 74-1013 (D.C. Cir. October 28, 1975). (TA Br. p.15). The language, however, held that EPA must deal directly with polluters instead of suing the State, where EPA seeks to enforce a federally imposed plan. This case does not involve a federally imposed plan and, in any event, the Transit Authority is an agent of the State with duties under the Plan, not a polluter. This is the reality and the theory of the complaint. As such, the Transit Authority's position is derivative of the State's, a situation not addressed in the cited case.

As set out fully in Plaintiffs' main brief, under such circumstances no additional notice was required to add the Transit Authority to the complaint. (Plaintiffs' Br. p.40-43).

B. The Statute Does Not Require Notice to a Party Joined for the Purpose of Granting Full Relief

Alternatively, the Transit Authority was properly joined as a party necessary to grant full relief. (Plaintiffs' Br. pp. 44-46).

The argument is fully understood in light of the history of the issue. The Plan does not contain a

strategy calling for maintenance of a fare level, but it does contain fare related strategies. The State sought to maintain a low fare by creating a new source of subsidies, tolls on the free East and Harlem River Bridges. (Brief of State of New York p.10, FOE v. EPA, Dkt. No. 73-2038). Secondly, the State adopted a parking reduction strategy designed to encourage use of transit and contain disadvantageous results from a fare increase. Thirdly, the Transit Authority's own strategy of increased express buses is directly related to modes of travel. FOE v. EPA, 499 F.2d at 1125. This Court favorably viewed these arguments and upheld the Plan without an explicit fare strategy. FOE v. EPA, 499 F.2d at 1125.

In August, 1975, without prior warning, the Transit Authority announced the fare increase. The reason given was inadequate subsidies from the City, State and Federal governments. (A164). Plaintiffs immediately reacted by seeking to enjoin the fare increase until implementation of the fare related strategies required by the Plan.

The Court plainly had jurisdiction to consider the motion. The Motion was directed to the Court's traditional power to preserve the status quo, a power expressly preserved in Section 304(e). Rule 65 applies as well because the Transit Authority was acting in

concert and in participation with the State. In effect, the State and the public authority to which the State had delegated the governmental function of setting fares, were opting for a fare increase rather than fulfilling the Plan strategies.

Factual relationship between persons determines the applicability of the descriptive term "persons in active concert or participation." Regal Knitwear Co. v. Board, 324 U.S. 9, 14-15 (1945). Here, the factual nexus is plain. The Transit Authority has express duties under the Plan, and has an obvious and admitted relationship to the State on fare levels as a successor of State power. N.Y. Pub. Auth. Law §§1202 and 1205; Wright v. County School Board, 309 F.Supp. 671 (E.D. Va. 1970), rev'd on other grounds, 442 F.2d 570 (4th Cir. 1971), aff'd, 407 U.S. 451 (1972) (procedure noted by Supreme Court at 458 n.10).

In response the Transit Authority and the City raise arguments wholly without merit. Significantly, the State, which stood before this Court to argue the relationship between fare levels and the toll, parking reduction and express bus strategies has not filed a brief.

The City argues that the Court lacks jurisdiction over the Transit Authority's conduct. (City Br. pp.18-20). The argument is without merit. This is

a case where the State joined with the federal government to abate air pollution and to forestall promulgation of a purely federal plan with federal enforcement. District of Columbia v. Train, Dkt. No. 74-1013 (D.C. Cir. October 28, 1975). It is well settled that the Federal Court has jurisdiction over the non-federal party in such circumstances. Biderman v. Morton, 497 F.2d 1141,1147 (2d Cir. 1974). The State's consent first in adopting its Plan and seeking EPA approval, and in defending its Plan in this Court, undermines any argument that the Court lacks jurisdiction either over the State or its delegate agencies.*

The Transit Authority argues that the District Court could only fashion remedies from express Plan strategies. (TA Br. pp. 10-11). The argument is not supported by case citation or statutes, and the Clean Air Act is to the contrary, preserving all remedies to which a plaintiff is otherwise entitled. Section 304(e). The object of the Plan is to prevent transit

*The City in a footnote makes the additional claim that Judge Weinfeld's opinion is res adjudicata on the notice issue herein. (City Br. p.21). The argument is without merit. The issue before Judge Weinfeld was commencement of an action before any notice was sent. Neither the Transit Authority nor the fare increase were before Judge Weinfeld. The issue here is joinder of an additional agent of the State and preliminary relief in a case properly commenced after adequate notice. Judge Weinfeld obviously reached neither on these issues.

riders from becoming automotive commuters in Manhattan. Defendants' actions in not implementing the Plan strategies and in nevertheless raising the fare allow the prohibited object to take place. As the Supreme Court held in discussing the scope of injunctive relief in antitrust cases, "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." International Salt Co. v. U.S., 332 U.S. 327,400 (1947).

Similarly, a state road building agency was enjoined from purchasing right-of-way (a legal activity) in order to preserve and safeguard the purposes of federal environmental law threatened by violations. Society for the Protection of New Hampshire Forests v. Brinegar, 381 F.Supp. 282 (D.N.H. 1974), injunction continued, Appalachian Mountain Club v.Brinegar, 394 F.Supp. 105,112 (D.N.H. 1975). According to the Supreme Court a central purpose of the Clean Air Act is to force the states "to attain air quality of specified standards, and to do so within a specified period of time." Train v. Natural Resources Defense Council, 421 U.S. at 64. A remedy designed to meet that objective falls within the Court's jurisdiction to grant relief preliminary to actual implementation of the Plan.

Neither defendant suggests or could suggest that the fare level and the violated strategies are not in fact interwoven with each other. The State Courts

recognize the obvious fact that modes of travel in New York City are of one piece:

> "It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged."
> New York Transit Authority v. Loos, 2 Misc.2d 733,154 N.Y.S.2d 209,214 (Sup. Ct. N.Y. Co. 1956), aff'd, 3 A.D.2d 740 (1st Dep't 1957).

This Court, likewise understood New York City's transportation system to be interrelated when it linked buses and parking availability to modes of travel. FOE v. EPA, 499 F.2d at 1125.

The Defendants would shackle the District Court in order to shield themselves from effective remedies. This Court has twice held that the citizen suit provision will not be so narrowly construed. Conservation Society of Southern Vermont v. Secretary, 508 F.2d 927,938 (2d Cir. 1974), vacated on other grounds, ____U.S.____ (1975); Natural Resources Defense Council v. Callaway, ____F.2d____, Dkt. No. 75-7048, Slip Op. (2d Cir. Sept. 9, 1975).

The Transit Authority also argues that even if the Court had jurisdiction to enjoin the transit fare,

the Plaintiffs were required to serve a sixty-day notice as to the fare increase before they could seek such relief. (TA Br. pp. 14-16). The argument is frivolous. Notice is required by the statute only as a requirement for commencement of an action, not as requirement of preliminary relief. Moreover, a "notice of violation" is required for violation, not for a fare increase which is itself not a violation of the Plan. Plaintiffs gave notice for the State's violations of the Plan, and there was no additional requirement for notice prior to seeking preliminary relief.

The Transit Authority's suggestion would turn the citizen suit provision into an obstacle course. Preliminary relief typically requires quick action. Here, the fare increase had been reported to be a week away when Plaintiffs brought on their motion. (A137). The Transit Authority would require in such situations service of a notice plus sixty-days before seeking preliminary relief. The position is nonsensical and unsupported by the statute.*

*The Transit Authority in a footnote suggests that there are in addition Constitutional infirmities to Plaintiffs' motion. (TA Br. p. 11, n.4). The argument is without merit for several reasons. This Court has already ruled that the Plan is enforceable. FOE v. EPA, supra. The cases relied upon by the Transit Authority to the contrary relate to federally promulgated plans, not plans adopted by a state opting into the program to avoid a federal plan. In addition the Transit Authority has no standing to raise the argument. Texas v. EPA, 499 F.2d 289,320 (5th Cir. 1974). Finally, the issue was not decided below but is now pending in the City's motion dated September 22, 1975.

C. The Chairman and General Counsel of the Transit Authority Received a Copy of the Notice of Violation. Dismissal on the Basis of Lack of Notice in Such Circumstances was Contrary to the Congressional Purpose

The Transit Authority's Chairman and General Counsel actually reveived Plaintiffs' "notice of violation" of the Plan. Such actual notice fully complies with the purposes of the statute. (Plaintiffs Br. pp. 46-48). Defendants ignore Plaintiffs' argument and its supporting facts and authorities. Instead they steadfastly rely on the fact that the corporate bodies differ while ignoring the fact that the human bodies are the same. They do not defend the District Court's conclusion, they merely repeat it. Clearly, the correct approach to notice is the functional approach adopted by this Court in Conservation Society of Southern Vermont v. Secretary, supra, and Natural Resources Defense Council v. Callaway, supra.

POINT III

THE COMPLAINT WAS IMPROPERLY DISMISSED

Plaintiffs showed in their brief that the District Court erred in dismissing the complaint as against the Transit Authority. (Plaintiffs' Br. Point III). In response the Transit Authority argues that the complaint was deficient because there was no separate claim against the Transit Authority. (TA Br. p.12) The argument is meritless. There was no separate cause of action against the Transit Authority, nor any subdivision of the State, because there was no need for one. This is an action to enforce the State Plan in which the State designated the Transit Authority and many other bodies to perform the State's duties under the Plan including Strategy B-5. These bodies were made defendants so as to allow the granting of full relief.

It would have been unnecessary and confusing to allege separate causes of action against every one of the many delegates of the State. The cause of action is singular as the complaint makes clear. The complaint alleges that the Transit Authority "shares responsibility with the State of New York for carrying out the measures required by the Transportation Control Plan"(A27), and that Chairman Yunich "in his official capacity...is responsible for carrying out measures required by the Transportation Control Plan." (A24). The first cause of action alleges that all "defendants" have violated

the schedules set forth in the Plan (A37), and the relief sought is to order implementation of the Plan as required by each strategy. (A38).

The complaint in fact contains more specific allegations against the Transit Authority than most other delegates. The strategy set forth in the complaint as an example alleges a failure to comply with Strategy B-5 which specifically called for action by the Transit Authority. (A34-35; A166).

In addition the Transit Authority, inexplicably, ignores the Attachments to the complaint. (A40-A92). The complaint and attachments run 77 pages, not 23 pages as mentioned by the Transit Authority. (TA Br. p.12). The attachments to the complaint explicitly mention the Transit Authority. (A57, A70, A72).

The Transit Authority argues that the procedures used to join it to the lawsuit were improper because joinder should have been effected by Court order pursuant to Rule 21 and not by amendment pursuant to Rule 15(a). (TA Br. p. 12). The argument is frivolous for two reasons: Plaintiffs made a Rule 21 motion (A130-131); and the Transit Authority consented to the procedures used below (A241).

CONCLUSION

The District Court's order of August 28, 1975 should be reversed in all respects. Plaintiffs' motion for preliminary relief relating to the transit fare and implementation of the Plan should be remanded to the District Court for adjudication. The Amended Complaint as against the Transit Authority should be reinstated and the Transit Authority ordered to serve its answer.

Dated: December 24, 1975
New York, New York

Respectfully submitted,

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A D D E N D U M

The status of the approved strategies calling for City action for which the EPA issued notice of violation is set out below. Citation is solely to affidavits filed in the District Court below in 74 Civ. 4500 (KTD) all in support of the City's motion dated September 22, 1975 to dismiss the complaint herein. The motion is currently held in abeyance by agreement of the parties.

Approved Strategy	Current City Position
A-3 - Thrice yearly taxi inspections	City refuses to implement. (Kove Aff., ¶¶5-11; Low Aff., ¶8).
B-1A - Strict enforcement on Traffic and Parking Regulations	City refuses to implement. (Codd Aff., ¶¶4-6; Low Aff., ¶7).
B-1B - Traffic Management	Not commented on.
B-1C - Partial ban on taxi cruising	City refuses to implement. (Low Aff., ¶¶9 and 10).
B-3 - Parking Reduction	City refuses to implement. (Beame Aff., ¶8; Low Aff., ¶B and Exh. "G" [letter of Mayor Beame dated Sept. 11, 1975]).
B-7 - Tolls on East and Harlem River Bridges	City refuses to implement. (Low Aff., ¶¶9,10 and 13 and Exh. "G" [letter of Mayor Beame dated Sept. 11, 1975]).
D-3 - After hours goods delivery	City refuses to implement. (Low Aff., ¶¶9, 10 and 12).

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-7497

FRIENDS OF THE EARTH, et al

Plaintiffs-Appellants

v.

HUGH CAREY, et al

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flusshing, N.Y.

That on the 29th day of December, 1975, deponent served the within Reply Brief for Plaintiffs-Appellants upon Hon. Louis Lefkowitz, Attorney General, State of N.Y.; X 2 World Trade Center, New York, N.Y. 10047 Hon. W. Bernard Richland, Corp. Counsel, City of New York, Municipal Building, New York, N.Y. 10007 Stuart Riedel, General Counsel, N.Y.C.T.A. 370 Jay Street, Brooklyn, N.Y. 11201

Attorney(s) for the Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me,

This 29th day of December 1975

William J. Buchan

WILLIAM J. BUCHAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976